



No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1944

**M. CLAUD SCREWS, FRANK EDWARD JONES, AND
JIM BOB KELLEY, PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority and dissenting opinions in the Circuit Court of Appeals (R. 217-227) and the concurring opinion of Judge Waller on petition for rehearing (R. 232) are reported in 140 F. (2d) 662.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 14, 1944 (R. 227), and a petition for rehearing (R. 228-231) was denied on February 18, 1944 (R. 232). The petition for a

writ of certiorari was filed on March 18, 1944, and was granted on April 24, 1944 (R. 236). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

**CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED**

The Fourteenth Amendment to the Constitution provides in pertinent part:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 20 of the Criminal Code (18 U. S. C. 52) provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the

Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

QUESTIONS PRESENTED

The petitioners, police officers of the State of Georgia, arrested a Negro on a warrant charging him with theft of a tire, and unjustifiably beat him to death.

(1) Does their action constitute an offense punishable under Section 20 of the Criminal Code?

(2) Is Section 20, as applied here, so vague and indefinite as to be unconstitutional?

STATEMENT

The petitioners—Screws, the sheriff of Baker County, Georgia, a position which he had held for seven years (R. 36, 168); Jones, a policeman in the city of Newton, Georgia (R. 36); and Kelley, a special deputy designated by Screws to assist Jones in making the arrest involved here (R. 170, 177)—were convicted on October 7, 1943, in the District Court of the United States for the Middle District of Georgia, on counts 2 and 3 of a three-count indictment returned against them in that court on April 10, 1943 (R. 2-9, 10). Count 1 of

the indictment (R. 2-4) which charged a violation of Section 19 of the Criminal Code (18 U. S. C. 51), was dismissed by the court upon demurrer (R. 24). Count 2 (R. 4-6) charged the petitioners with violating Section 20 of the Criminal Code (18 U. S. C. 52), and count 3 (R. 6-9) charged them with conspiring to violate Section 20, contrary to Section 37 of the Criminal Code (18 U. S. C. 88). Each petitioner was sentenced to a total of three years' imprisonment and payment of a \$1,000 fine (R. 11-15). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, their convictions were affirmed (R. 217-223). Judge Sibley dissented (R. 223-227).

The petitioners assigned as error in the court below (R. 214) only the overruling of their demurrer to counts 2 and 3 of the indictment and the denial of their motion, at the conclusion of all the evidence, for a directed verdict. The questions presented, therefore, relate solely to the sufficiency of those counts of the indictment, together with the proof adduced at the trial, to sustain the convictions.

The Indictment.

Count 2 (R. 4-6) charged that on January 29 and 30, 1943, Screws and Jones, aided and abetted by Kelley, arrested Robert Hall, a Negro citizen of the United States and of the State of Georgia, brought him to the well in front of the courthouse at Newton, Georgia, and there unlawfully and

wrongfully beat him about his head with a black-jack and with their fists, thus causing his death. It was further alleged that the petitioners acted under color of the laws, statutes, ordinances, regulations, and customs of the State of Georgia, Baker County, and the municipality of Newton, Georgia, and that they deprived Hall of the following rights, privileges, and immunities secured to him and protected by the Fourteenth Amendment of the federal Constitution: to be secure in his person and to be immune from illegal assault and battery; not to be deprived of liberty and life without due process of law; not to be denied equal protection of the laws; not to be subjected to different punishments, pains, and penalties by reason of his race or color than are prescribed for the punishment of other citizens; to be tried, by due process of law, upon the charge on which he had been arrested, and, if found guilty, to be sentenced and punished in accordance with the laws of the State of Georgia.¹

¹ In *United States v. Classic*, 313 U. S. 299, 327, this Court held that Section 20 of the Criminal Code authorizes the punishment of two distinct offenses: (1) willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; and (2) willfully subjecting any inhabitant to different punishments on account of his alienage, color, or race, than are prescribed for the punishment of citizens. The petitioners do not contend that count 2 charges these two different offenses and hence is duplicitous. It is evident that the allegation that a different punishment was inflicted upon Hall because he was a Negro was merely

Count 3 (R. 6-9) charged that, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), the petitioners conspired to commit the offense described in count 2, and that in furtherance of this conspiracy they committed specified overt acts.

The Evidence.

The evidence supporting these allegations of the indictment may be summarized as follows:

Hall was a young Negro, about 30 or 31 years old at the time of his death, who lived on a farm near Newton in Baker County, Georgia (R. 35-36, 38). In December 1942, Jones had taken Hall's pistol and given it to Screws (R. 36-37, 41-42). When Screws refused to return the gun, Hall appealed to the local grand jury (R. 40). Screws told the grand jury that he was going to keep the pistol until a judge ordered him to return it, and that if "any of these damn negroes" carried pistols, he would take them away (R. 40-41). The grand jury concluded that there was no relief they could give Hall (R. 40). When Screws persisted in his refusal to return the pis-

a specific enumeration of one of the rights guaranteed by the Fourteenth Amendment alleged to have been denied him, *i. e.* the equal protection of the laws. The case was tried on the theory that only one offense was involved, namely, willful deprivation of rights secured by the Constitution. Consequently, no question is here presented as to the sufficiency of the indictment and the proof to support a conviction of the second offense punishable under Section 20.

tol, Hall retained counsel who wrote Screws requesting return of the gun. This letter was received by Screws on January 29, 1943. (R. 43-44, 176, 194-195.) There was evidence that, following receipt of this letter, Screws in the early evening of January 29 entered the Whites' filling station in Newton, and stated that he wanted someone to accompany him, "that he was going to go and get the black SB and going to kill him, that he had lived too long then" (R. 46). A witness testified: "He walked in and asked me did I have any guts and I told him yes, a little bit and he said well I am going to get Bobby Hall and I told him no I couldn't afford to go * * *" (R. 50). Later that evening at a local barroom at which Screws and the two other petitioners were drinking (R. 50-57), the barkeeper, because Screws had been drinking, exhorted him not to go through with the proposed arrest that night (R. 52-53).

Shortly after midnight, while Screws waited at the well in front of the Newton courthouse, Kelley and Jones, at Screws' direction, drove in Screws' car to Hall's home (R. 65, 170).² Jones roused Hall from bed; asserting that he had a warrant for his arrest charging him with theft of a tire

² Earlier in the evening Kelley had driven to Hall's home and under the pretense of seeking Hall, who was a mechanic, to repair his car, had ascertained that Hall had not yet returned from work (R. 58).

(R. 59). While Hall was dressing, Jones, with his gun drawn (R. 74), recalled that Hall had been before a grand jury in an effort to recover his pistol and had been to see a lawyer (R. 59-60). Jones, noticing a shotgun behind Hall's bed, took the gun, unloaded it, and told Hall that he would keep it until Hall returned (R. 59, 60, 71). Hall was taken to the car, handcuffed, and placed in the rear seat (R. 61, 71, 74, 170); the shotgun was placed in the front seat between Kelley and Jones (R. 71, 72, 74).

When the car arrived at the courthouse square the sheriff was waiting for them at the well in front of the courthouse (R. 71). Screws opened the door and ordered Hall to get out (R. 65). When Hall alighted from the car, all three petitioners began beating him with their fists and a solid-bar blackjack about eight inches long and weighing two pounds (R. 66, 72, 75, 76, 81, 171). Hall was soon knocked to the ground, and there-

³ The validity of the warrant was questioned at the trial by the testimony of a handwriting expert employed by the F. B. I. who stated that the warrant was written at least in substantial part by Screws (R. 125-132, 147-148). Screws stated to an agent of the F. B. I. that he did not know who had written the warrant (R. 68) or who had entered it on the docket, that he did not recognize the handwriting appearing on its face, and that he had not written it or made the docket entry (R. 69). Neither George Durham, who allegedly procured the warrant, nor the justice of the peace who was supposed to have issued the warrant, was called as a witness.

after for a period of at least from 15 to 30 minutes the petitioners continued to pummel him (R. 80-82, 83-84, 85-87, 89-92, 94-95, 98-99, 99-101). Witnesses testified that the petitioners were loud and profane (R. 83, 89, 90, 94-95, 97), and were heard to cry frequently, "hit him again, damn him, hit him again" (R. 84, 87, 90, 94). The blows administered to Hall could be heard in nearby houses (R. 86-87, 89, 90). Twenty or thirty minutes after the beating began a shot was fired in the courtyard, and thereafter the noise subsided (R. 84, 86, 88-89, 90, 94-95, 98, 100).

Kelley and Jones then dragged Hall feet first from the well through the courthouse yard into the jail (R. 86, 102, 103-104, 105). There they threw him on the floor, dying, his hands still in cuffs (R. 102, 104, 105, 107). Jones returned to the jail about 15 or 20 minutes later and removed the handcuffs from the unconscious man (R. 103, 105, 107). Soon thereafter Screws called an ambulance and Hall was removed to a hospital (R. 171), where he died within an hour (R. 111).⁴

After the killing Screws told an F. B. I. agent that he had known Hall all his life and had had

⁴The attending physician testified that Hall's death was due to blows on the right side of his skull (R. 111). The undertaker testified that Hall was unrecognizable when first brought to him (R. 112), that the skin on his chest and other parts of his body was scraped off, that his right ear was mutilated, and that his head was crushed (R. 113-114).

trouble with him for two years; that Hall was a "biggety negro, that he considered himself to be a leader among the colored people in the community" (R. 64; see also R. 177). Shortly after Hall died, Kelley, upon being told of his death, stated that "it was just another negro dead" (R. 48).

The petitioners' defense at the trial was that Hall's death resulted from his violent resistance when he was directed by Serews to get out of the car after it arrived in the courthouse square. Serews testified as follows (R. 171):

I opened the door and I said "All right, Bobby, get out" and I noticed he wasn't in any hurry to get out but when he, when I did see him come out, I saw something coming out ahead of him like that (indicating) and I discovered it was a gun; and he said "You damn white sons—" and that is all I remember what he said. By that time I knocked the gun up like that and the gun fired off right over my head; and when it did he was on the ground by then and me and Kelley and Jones ran into him and we all were scuffling and I was beating him about the face and head with my fist. I knew Jones had a blackjack and I told him to hit him and he hit him a lick or two and he didn't seem to weaken and I said "Hit him again." When he fell to the ground, we didn't hit him on the ground. * * * I would be afraid to say how long it was before he was beaten to where he quit

resisting us or quit trying to assault me because in a time like that you would be a poor judge of time; I think.

The Charge.

The trial court instructed the jury as follows with respect to the lawful powers of arresting officers (R. 207-208, 211-212):

Now, gentlemen of the jury, I charge you that an officer, like the sheriff or any arresting officer, has certain rights and only certain rights in connection with a prisoner in his custody under arrest. I am going to read you two statements from the Supreme Court of this state, the Georgia Supreme Court, about what sheriffs can do legally. In this case it says—and this is the Supreme Court of Georgia—“There was no error in charging that an officer cannot suffer himself to be overcome by any opprobrious words or abusive language while he is acting as a minister of the law. He cannot chastise his prisoner for insolence, that is to say, for being uppity. He cannot yield to his passion and take the administration of punishment into his own hands, but can only use such force as is necessary to make the arrest effectual.”

In another case, the Court of Appeals this is instead of the Supreme Court, said—that is the Georgia Court of Appeals: “The act of an arresting officer in holding in custody a person whom he has arrested for violation of the law is an act done by virtue

of his office. It is the duty of an arresting officer, who has a person under arrest for a violation of law, to refrain from unlawfully assaulting or killing the prisoner."

So, under the holdings of our own appellate Courts, I charge you that legally a sheriff or other officers would have no right to assault and beat or kill a prisoner, no matter what the prisoner said. That is what the Supreme Court of Georgia says, that the sheriff acting as a minister of the law who arrests a man and has him in his custody cannot strike him or beat him or kill him legally, no matter what the prisoner says.

So, if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia.

I charge you, in that connection, that an arresting officer does have the right to use such force as is necessary in order to make the arrest, if he has a legal process under which to make the arrest. A sheriff who has legal process to make an arrest, has a warrant, has a right to make that arrest and he has a right to use such force, but

only such force, as is necessary in order to make the arrest and over and above that he has no right to impose any sort of punishment on his prisoner.

I charge you that the sheriff or other officer, if he had a prisoner under legal arrest and it became necessary in order to prevent the prisoner from killing the sheriff or other officer or doing him serious bodily harm, would have a right to use such force as was necessary to prevent it. That is all the right that arresting officers have in connection with imposing punishment on a prisoner.

* * * * *

I said to you, gentlemen of the jury, that if an officer has a prisoner under arrest and it becomes necessary, in order to prevent the killing of the officer by the prisoner or the inflicting of serious bodily harm upon him, that the officer would have a right to use such force as would be necessary to prevent the injury or the killing to himself, but only that much force and no more. I charge you in that connection that in this case you will determine from the evidence what the situation was around the well during that occurrence that you have heard about, what things have been proved, in your opinion. Get what the exact situation actually was and if from that situation as you find it to be, you think that the officers could reasonably conclude under those circumstances that it was necessary to do what

they did do to prevent injury or death to themselves, then they would have a right to do it but they would have the right only to do what they thought under the circumstances was absolutely necessary in order to prevent injury or death to themselves. [Italics added.]

SUMMARY OF ARGUMENT

Section 20 of the Criminal Code makes it punishable for anyone, acting under color of law, willfully to deprive any person of rights, privileges, or immunities secured or protected by the Constitution and laws of the United States. The offense includes two elements: willful deprivation of rights secured by the Constitution, and action taken under color of law. We believe that the indictment and the supporting proof are sufficient to sustain the petitioners' convictions under Section 20, and that the statute, as applied here, is not so vague and indefinite as to be unconstitutional.

I

The evidence showed that the petitioners willfully deprived Hall of rights secured to him by the Fourteenth Amendment, particularly the right not to be deprived of life without due process of law. Since the Fourteenth Amendment protected Hall against state and not individual action, the Government was required to show not only that the rights of which he was deprived were

secured to him by the Constitution, but also that such deprivation was the act of the State.

There can be little doubt that the rights of which Hall was deprived by the petitioners, acting in the name of and for the State, were secured to him by the Fourteenth Amendment. The jury's verdict establishes that the petitioners' assault upon Hall was neither "necessary to make the arrest effectual or necessary to their own personal protection" (R. 208). If due process of law requires that no man be condemned to death upon evidence procured from him through violence or coercion, it is an *a fortiori* conclusion that a State may not take his life without even affording him a trial. Due process of law forbade, therefore, that Hall be deprived of his life unless he were tried and convicted of a crime punishable by death, and in accordance with procedures complying with the requirements of fundamental fairness and justice.

We believe that, for purposes of determining criminal liability under Section 20, the acts of the petitioners are referable to the State. It may be conceded that the petitioners' conduct, as charged in the indictment and found by the jury, was in violation of state law. It is submitted, nevertheless, that the question whether conduct constitutes state action for purposes of applying the criminal sanctions of Section 20 is not to be determined merely by inquiring whether the State

has authorized the particular acts involved. To speak of state action is, of course, to employ an abstraction. A State itself never acts: it acts, and can act, only through individuals purporting to act on its behalf, legislators, judges, executive and administrative officers. Whether acts of its officers are to be imputed to a State has been made to depend, generally speaking, upon the purpose for which such determination is sought to be made.

While the setting in which it is here presented may be novel, the question itself is not new. The contentions which the petitioners make in this case were unsuccessfully pressed upon this Court as early as 1879, only eleven years after the adoption of the Fourteenth Amendment, in *Ex parte Virginia*, 100 U. S. 339. The Court there held (100 U. S. at 347): "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Here, as in *Ex parte Virginia*, the petitioners were not and did not purport to be acting as private individuals; they did not attempt to show at the trial that they were seeking to satisfy their personal feelings; the trial court was not requested to charge the jury that

the petitioners should be acquitted if their motives in assaulting Hall were of a personal nature. The petitioners contended at the trial that the death of Hall occurred during the performance of their official duties as arresting officers, and that they acted only to meet his forcible resistance to arrest. The petitioners acted in the name of and for the State, and were clothed with the powers of the State—powers which they did not possess and could not exercise as private individuals. They were acting in their capacity as police officers sheltered by the protective authority of the State. Here, no more than in *Ex parte Virginia*, the petitioners cannot avoid the penalties imposed by federal law for the infringement of federal rights by claiming that they were responsible for the manner in which they discharged their duties only to the State whose officers they were and whose law they were bound to enforce.

Ex parte Virginia does not stand alone; it is merely the first in a series of decisions establishing that action by state officers does not lose its character as state action merely because unauthorized by the State. The petitioners' reliance upon *Barney v. City of New York*, 193 U. S. 430, and similar cases, is misplaced. The considerations which may be persuasive in leading towards refusal of federal jurisdiction in civil suits, where the plaintiff has a choice of forums and where the bringing of suit in a state court affords the State

an opportunity to correct or redress the wrong done in its name, are wholly inapplicable to federal criminal proceedings in which the federal Government is seeking to vindicate a federal right which can be asserted only in the federal courts. Unlike civil suits to redress infringements of civil rights, criminal prosecutions under Section 20 can be brought only in federal courts. 28 U. S. C. 371. The federal Government is powerless to initiate any proceedings in the state courts which might enable the highest court of the State to confirm or disavow the acts of subordinate state officials. This is particularly true where the victim has suffered the loss of life, which obviously cannot be restored to him. If, as in this case, officers, acting in the name of and for the State take a man's life without due process of law, no other officers of the State, judicial or otherwise, can ever have the opportunity to correct or undo the wrong done in its name. The denial of his constitutional right not to be deprived of life without due process of law was irrevocably effected when Hall was unjustifiably beaten to death by the petitioners.

Its legislative history supports the construction of Section 20 as applicable to deprivations of constitutional right made by subordinate state officials, acting in the name of and for the State, even though not authorized by it. If the provision were to be limited to the actions expressly authorized

by state law, the statute would have only the most trivial scope—particularly in view of the requirement that deprivations of constitutional right be “willful.” Where an action is based upon an explicit direction of state law, a mistake of law may well negate the element of willfulness. There is no justification in its legislative history for thus reducing the scope of the statute which, in the clearest and most unequivocal language, was designed to confer broad federal protection upon the enjoyment of basic constitutional rights.

There can be no doubt that the petitioners’ actions were taken under color of state law. They acted in their capacity as state law-enforcement officers; they did not purport to be acting as private individuals not endowed with the authority of the State. Since they were acting in the performance of their official duties, it is immaterial that they may have exceeded their authority. “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” *United States v. Classic*, 313 U. S. 299, 326.

II

Section 20, as applied here, is not so vague and indefinite as to be unconstitutional. This Court has held in *United States v. Classic*, *supra*, at 328-329, that the comprehensive character of the

rights protected by Section 20 does not subject the statute to constitutional infirmities. Moreover, the validity of Section 19 of the Criminal Code (18 U. S. C. 51), which punishes conspiracies to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States," has repeatedly been upheld. In *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89, principally relied upon by Judge Sibley in his dissenting opinion in the court below, a conviction was held unconstitutional where the statute left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against" and where "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The comprehensiveness of Section 20 is of a different order. It was natural that Congress, in seeking to protect all rights secured by the Constitution, should not undertake to catalogue every federally protected right. The possibility that in circumstances not here presented, there may be difficulty in determining whether there has been such a deprivation of constitutional right as to come within the penalties of Section 20 is no

reason for doubting the validity of the statute in cases where its applicability is clear.

ARGUMENT

Since the petitioners complain only that the trial court erred in overruling their demurrer to counts 2 and 3 of the indictment and in denying their motion, at the conclusion of all the evidence, for a directed verdict, the questions before the Court are whether those counts of the indictment and the supporting proof are sufficient to sustain the convictions under Section 20 of the Criminal Code (18 U. S. C. 52),⁵ and whether the statute, as applied here, is so vague and indefinite as to be unconstitutional.

I

THE INDICTMENT AND THE PROOF WERE SUFFICIENT TO SUSTAIN THE CONVICTIONS

Section 20 of the Criminal Code, which is derived from § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, punishes anyone who, acting under color of law, willfully deprives any person of any rights, privileges, or immunities secured or

⁵ Count 3, the conspiracy count, depends for its validity upon count 2. If the latter count is sustained, it is clear that an agreement among the petitioners to accomplish the offense proscribed by Section 20 is a conspiracy under Section 34 of the Criminal Code. *Culp v. United States*, 131 F. (2d) 93, 99 (C. C. A. 8). The jury's finding in this respect, which is unchallenged by the petitioners, is amply supported by the evidence summarized in the Statement, *supra*, pp. 6-11.

protected by the Constitution and laws of the United States. "The generality of the section, made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like." *United States v. Classic*, 313 U. S. 299, 328-329. We submit that both elements of the offense punishable by Section 20, namely, (a) willful deprivation of rights secured by the Constitution, and (b) action taken under color of law, are present in this case.

A. THE PETITIONERS WILLFULLY DEPRIVED HALL OF RIGHTS
SECURED TO HIM BY THE FOURTEENTH AMENDMENT

Count 2 of the indictment alleged, *inter alia*, that the petitioners willfully deprived Hall of the following rights secured to him by the Fourteenth Amendment: not to be deprived of life without due process of law; and to be tried, upon the charge on which he had been arrested, by due process of law, and if found guilty, to be sentenced and punished in accordance with the laws of the State of Georgia (R. 4-6). Since the Fourteenth Amendment protects these rights against state, and not individual, action, *Virginia v. Rives*, 100 U. S. 313, 318; *United States v. Harris*, 106 U. S. 629, 639-640; *Civil Rights Cases*, 109 U. S. 3; *Hodges v. United States*, 203 U. S.

1; *United States v. Powell*, 212 U. S. 564, the Government was required to establish not only that the rights of which Hall was deprived were secured by the Fourteenth Amendment, but also that such deprivation was the act of the State of Georgia.

Assuming for the moment that the acts of the petitioners were the acts of the State—an assumption whose validity we shall presently attempt to demonstrate—there can be little doubt that the rights of which Hall was deprived were secured to him by the Fourteenth Amendment. The Amendment explicitly forbids the taking of life or liberty without due process of law. The breadth of the protection afforded by the due process clause in this class of cases is evidenced by a recent statement of the Court: “The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as ‘the law of the land’.” *Buckalter v. New York*, 319 U. S. 427, 429, and cases there cited. Compare Mr. Justice Johnson in *Bank of Columbia v. Okely*, 4 Wheat. 235, 244: “As to the words from Magna Charta * * *, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from

the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." And see *Strauder v. West Virginia*, 100 U. S. 303, 310: "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property."

The jury's verdict establishes that the petitioners' assault upon Hall was neither "necessary to make the arrest effectual or necessary to their own personal protection" (R. 208). If due process of law commands that no man be condemned to death upon evidence procured from him through violence or coercion, see *Ashcraft v. Tennessee*, 322 U. S. 143, 155, and cases cited, it is an *a fortiori* conclusion that a State may not take his life without even affording him a trial. Cf. *Mooney v. Holohan*, 294 U. S. 103; *Moore v. Dempsey*, 261 U. S. 86. Due process of law clearly forbade, therefore, that Hall be deprived of his life unless he were tried and convicted of a crime punishable by death, and in accordance with procedures complying with the requirements of fundamental fairness and justice. Cf. *Logan v. United States*, 144 U. S. 263, 294.

We are thus brought to the principal question in the case: are the acts of the petitioners to be ascribed to the State of Georgia? Whatever answer may be given for purposes not here relevant, it is submitted that, for purposes of determining responsibility under Section 20, the question is to be answered in the affirmative. We may concede, at the outset, that the petitioners' conduct, as charged in the indictment and found by the jury, was in violation of Georgia law. As the trial court charged the jury (R. 207), it is the law of Georgia (as it is generally, see 1 Anderson on Sheriffs, § 120) that "an officer to keep the peace cannot suffer himself to be overcome by opprobrious words or abusive language while acting as a minister of the law, armed with legal power, and exerting it over a prisoner; he cannot chastise his prisoner for insolence; he cannot yield to his passions, and take the administration of punishment, as it were, into his own hands." *Burns v. Georgia*, 80 Ga. 544, 548; *Moody v. Georgia*, 120 Ga. 868. In addition to forbidding the deprivation of life, liberty, or property without due process of law (Art. I, § 2-103), the Constitution of the State of Georgia expressly provides that no person shall be "abused in being arrested, while under arrest, or in prison" (Art. I, § 2-109). The petitioners' violation of their legal duty as arresting officers might conceivably have been punished criminally under

Georgia law as an assault and battery (see *Burns v. Georgia*, and *Moody v. Georgia*, *supra*), as manslaughter (see *O'Connor v. Georgia*, 64 Ga. 125), or as murder. If Hall's death were found to have been caused by the petitioners' criminal acts, his widow or children could, under the Georgia wrongful death statute, recover from them the "full value" of his life. Ga. Code Ann., §§ 105-1301 *et seq.* The State requires its sheriff to post bonds in the sum of \$10,000, conditioned upon the faithful performance of their duties (Ga. Code Ann., § 24-2805); and such bond is "for the use and benefit of every person who is injured * * * by any wrongful act committed under color of his office" (Ga. Code Ann., § 89-418; see *Powell v. Fidelity & Deposit Co.*, 45 Ga. App. 88).

We submit, however, that the question whether the petitioners' conduct constituted state action for purposes of applying the penal sanctions of Section 20 is not to be determined merely by inquiring whether the State has authorized the particular acts involved. To speak of state action is, of course, to employ an abstraction. A State itself never acts: it acts, and can act, only through individuals purporting to act on its behalf, legislators, judges, executive and administrative officers. Whether acts of its officers are to be imputed to a State has been made to depend, generally speaking, upon the purpose for which

such determination is sought to be made. Thus, in cases such as *Ex parte Young*, 209 U. S. 123; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; and *Looney v. Crane Co.*, 245 U. S. 178, suits to enjoin state officers from enforcing allegedly unconstitutional statutes have been held not to be suits against the State in violation of the Eleventh Amendment, even though the officers' actions were regarded as state action under the Fourteenth Amendment. See *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 246, n. 5.

While the setting in which it is here presented may be novel, the question itself is not new. The contentions which the petitioners make in this case were pressed upon this Court as early as 1879, only eleven years after the adoption of the Fourteenth Amendment, in *Ex parte Virginia*, 100 U. S. 339. That case arose under the Act of March 1, 1875, 18 Stat. 336 (8 U. S. C. 44), which provided that no citizen should be disqualified for service as a juror in any court, federal or state, on account of his race, color, or previous condition of servitude; and punished any officer or other person charged with the selection of jurors who should exclude any citizen for such cause. A judge of the State of Virginia was indicted in a federal district court for violation of the statute, and was taken into custody. Applications to this Court for a writ of habeas corpus were made by him and the State. Since

the law of Virginia authorized no discriminations based upon race, color, or previous condition of servitude, its Attorney General contended at the bar of this Court that "the State had done its duty, and had not authorized or directed that county judge to do what he was charged with having done; that the State had not denied to the colored race the equal protection of the laws; and that consequently the act of Cole [the judge] must be deemed his individual act, in contravention of the will of the State." Harlan, J., dissenting in the *Civil Rights Cases*, 109 U. S. 3, 58. This Court, nevertheless, denied the applications and sustained the validity of the statute as an exercise of Congress's powers under the Fourteenth Amendment (100 U. S. at 346-347):

They [the prohibitions of the Fourteenth Amendment] have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes

away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Mr. Justice Field's dissenting opinion, concurred in by Mr. Justice Clifford, insisted that: "If Congress could, as an appropriate means to enforce the prohibition [of the due process clause of the Fourteenth Amendment], prescribe criminal prosecutions for its infraction against legislators, judges, and other officers of the States, it would be authorized to frame a vast portion of their laws; for there are few subjects upon which legislation can be had besides life, liberty, and property" (100 U. S. at 366). Only to the dissenting Justices, however, was it clear that "for the manner in which he [the county judge] discharges this duty [of selecting jurors] he is responsible only to the State whose officer he is and whose law he is bound to enforce" (*id.*, at 349).

In the case at bar the petitioners were not and did not purport to be acting as private individuals; they did not attempt to show at the trial that they were seeking to satisfy personal feelings towards Hall; the trial court was not requested to charge the jury that the petitioners should be acquitted if their motives in assaulting

Hall were of a personal nature. As has been noted (*supra*, p. 10), the petitioners contended at the trial that the death of Hall was incidental to performance of their official duties as arresting officers, and that they acted only to meet his forcible resistance to arrest. Here, as in *Ex parte Virginia*, the petitioners acted in the name of and for the State, and were clothed with the powers of the State—powers which they did not possess and could not exercise as private individuals. The State of Georgia has by statute endowed its sheriffs with the power and duty of executing warrants. Ga. Code Ann., §§ 24-2801, 24-2804, 24-2813. And sheriffs are empowered to appoint deputies to assist in the performance of their duties. Ga. Code Ann., § 24-2811. Screws as sheriff, Jones as a local policeman, and Kelley as a special deputy designated to aid Jones in executing the warrant for the arrest of Hall, were acting in their capacity as police officers sheltered by the protective authority of the State. Here, no more than in *Ex parte Virginia*, the petitioners cannot avoid the penalties imposed by federal law for the infringement of federal rights by claiming that they were responsible for the manner in which they discharged their duties only to the State whose officers they were and whose law they were bound to enforce.

Ex parte Virginia does not stand alone; it is merely the first in a long series of decisions estab-

lishing that action by state officers does not lose its character as state action merely because unauthorized by the State. See *Neal v. Delaware*, 103 U. S. 370, 397; *Civil Rights Cases*, 109 U. S. 3, 15-18; *Chicago, Burlington and Quincy R. R. Co. v. Chicago*, 166 U. S. 226, 233-234; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 35-37; *Ex parte Young*, 209 U. S. 123; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 288-289; *Cuyahoga Power Co. v. Akron*, 240 U. S. 462; *Fidelity and Deposit Co. v. Tafoya*, 270 U. S. 426, 434; *Hopkins v. Southern California Telephone Co.*, 275 U. S. 393, 398; *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 245-246; *Nixon v. Condon*, 286 U. S. 73, 89; *Mosher v. City of Phoenix*, 287 U. S. 29; *Sterling v. Constantin*, 287 U. S. 378, 393; *Mooney v. Holohan*, 294 U. S. 103; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 342; *Hague v. C. I. O.*, 307 U. S. 496, 512; *Cochran v. Kansas*, 316 U. S. 255; *Pyle v. Kansas*, 317 U. S. 213; *Snowden v. Hughes*, 321 U. S. 1.

In *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, suit was brought in a federal district court to enjoin officials of the city of Los Angeles from enforcing a city ordinance fixing telephone rates alleged to be confiscatory and in violation of the Fourteenth Amendment. The defendants asserted that if the rates were confiscatory, they would also violate the due process clause of the state constitution and hence could not be regarded

as state action within the Fourteenth Amendment. Mr. Chief Justice White, speaking for a unanimous Court, rejected this contention in unequivocal language (227 U. S. at 287):

* * * the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by State officers which are within the scope of the power conferred by the State. The proposition hence applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of a State is within the reach of the Amendment unless such act can be held to be the act of the State by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if

the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

The point was regarded as so settled in 1931, when *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, was decided, that Mr. Justice Brandeis, also the spokesman for a unanimous Court, was able to state the proposition in axiomatic terms (284 U. S. at 245-246):—

* * * The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. *Virginia v. Rives*, 100 U. S. 313, 318; *United States v. Harris*, 106 U. S. 629, 639. But acts done “by virtue of a public position under a State Government * * * and in the name and for the State,” *Ex parte Virginia*, 100 U. S. 339, 347, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to

an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law. * * *

The petitioners contend, nevertheless, that their acts are not referable to the State unless authorized by the legislature or confirmed by the highest court of the State. Their chief reliance is placed upon the concurring opinion of Mr. Justice Frankfurter in *Snowden v. Hughes*, 321 U. S. 1, 13, and *Barney v. City of New York*, 193 U. S. 430. In the *Snowden* case a suit for damages was brought in a federal district court against members of a state election board for refusing to certify the plaintiff as a candidate for the state legislature, thus allegedly denying him the equal protection of the laws. The district court dismissed the suit upon the ground that, since the complaint showed that the state officers had failed to perform duties imposed upon them by state law, their failure to certify the plaintiff was not state action and hence no rights secured to the plaintiff by the Fourteenth Amendment had been infringed. The Circuit Court of Appeals for the Seventh Circuit affirmed on the same ground (132 F. (2d) 476), on the authority of the *Barney* case. The judgment was

affirmed by this Court, however, on the ground that the complaint failed to allege a purposeful discrimination based upon race or color, and hence the right asserted by the plaintiff was not secured by the equal protection clause of the Fourteenth Amendment. 321 U. S. 1. Mr. Justice Rutledge concurred in the result, and Mr. Justice Douglas and Mr. Justice Murphy dissented. In a separate concurring opinion Mr. Justice Frankfurter expressed his agreement with the court below in its holding that *Barney v. City of New York* was controlling. The action of the state board, admittedly in defiance of state law, could not, in the opinion of Mr. Justice Frankfurter, "be deemed the action of the State, certainly not until the highest court of the State confirms such action and thereby makes it the law of the State." 321 U. S. at 17. The majority of the Court found it unnecessary to consider whether the defendants' conduct constituted state action within the meaning of the Fourteenth Amendment. Speaking for the majority, Mr. Chief Justice Stone stated that the authority of the *Barney* case had been "so restricted by our later decisions * * * that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action." 321 U. S. at 13.

In our view the question for decision in the present case may be distinguished from that pre-

sented in *Snowden v. Hughes* and *Barney v. City of New York*. Both of the latter cases involved civil suits brought in the federal courts to redress illegal acts of state officers allegedly in violation of the Fourteenth Amendment. As precisely stated by Mr. Justice Frankfurter in his concurring opinion in the *Snowden* case (321 U. S. at 16), the question in such cases "is not whether a remedy is available for such an illegality, but whether it is available in the first instance, in a federal court." We submit that the considerations which may be persuasive in leading towards refusal of federal jurisdiction in civil suits, where the plaintiff has a choice of forums and where the bringing of suit in a state court affords the State an opportunity to correct or redress the wrong done in its name, are wholly inapplicable to federal criminal proceedings in which the federal Government is seeking to vindicate a federal right which can be asserted only in the federal courts. Unlike civil suits to redress infringements of civil rights, criminal prosecutions under Section 20 can be brought only in the federal courts. 28 U. S. C. 371. The federal Government is powerless to initiate any proceedings in the state courts which might enable the highest court of the State to confirm or disavow the acts of subordinate state officials. This is particularly true where the victim has suffered the loss of life, which cannot, of course, be restored to him. If,

as in this case, officers, acting in the name of and for the State, take a man's life without due process of law, no other officers of the State, executive, legislative, or judicial, can ever have the opportunity to correct or undo the wrong done in its name. The denial of Hall's constitutional right not to be deprived of life without due process of law was irrevocably effected when he was unjustifiably beaten to death by the petitioners. Neither his life nor his constitutional right could be restored by any proceeding instituted under the aegis of the State, whether judicial or otherwise.

Barney v. City of New York, whatever its current vitality, is not controlling here. "The question there decided," as stated by Mr. Justice Brandeis in *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 246, "was that the lower federal court had properly dismissed a bill in equity since it appeared upon its face that the act complained of was forbidden by the state legislation." Suit was brought in a federal circuit court to enjoin New York City, and its transit officials, from proceeding with the construction of a subway, on the ground that such action would deprive the plaintiff of property without due process of law. The asserted deprivation of rights secured by the Fourteenth Amendment was based solely, however, upon the allegation that the state officials failed to comply with the state statute in chang-

ing plans for the construction of the railway without obtaining the approval required by the statute. In earlier proceedings in the state courts it had been held that, although the construction was without legal authority, the plaintiffs should be left to their remedies at law. *Barney v. Board of Rapid Transit Commissioners*, 38 Misc. 549; *Barney v. City of New York*, 39 Misc. 719, affirmed, 83 App. Div. 237. The circuit court dismissed the bill for want of jurisdiction, and this Court affirmed. The opinion of Mr. Chief Justice Fuller is ambiguous, however, with respect to the precise grounds of the decision. His assertion (193 U. S. at 437), as a general proposition, that—

* * * the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction * * *

is, as has already been observed, inconsistent with later decisions of this Court, particularly *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 37; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 294; and *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 246. The Chief Justice continued, however, as follows (193 U. S. at 437-438):

Controversies over violations of the laws of New York are controversies to be

dealt with by the courts of the State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law.

This language suggests that the *Barney* case may properly be regarded as but an application of the principle, more fully developed in later decisions, that a federal court of equity may, in the exercise of its sound discretion, decline to intervene in purely local controversies involving only questions of state law which should, in the first instance at least, be litigated in the state courts. See Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 Harv. L. Rev. 969. The decisions of this Court, particularly in recent years, "reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496, 501. Thus, federal courts have declined to enjoin state criminal prosecutions, *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 95; *Beal*

v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Watson v. Buck*, 313 U. S. 387, 401; *Douglas v. Jeannette*, 319 U. S. 157; to interfere with the collection of state taxes, *Matthew's v. Rodgers*, 284 U. S. 521; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293; to appoint a receiver to manage the affairs of an insolvent state bank, when the State had entrusted liquidation to a state agency, *Pennsylvania v. Williams*, 294 U. S. 176; to interfere with a state agency's establishment of local utility rates, *Central Kentucky Gas Co. v. Railroad Commission*, 290 U. S. 264, 271; or to intervene in controversies found to involve the shaping of state administrative policy, *Burford v. Sun Oil Co.*, 319 U. S. 315. Where a definitive ruling by a state court upon a doubtful question of state law might avoid decision of serious constitutional questions, a federal court adhering to the basic principle that substantial constitutional questions should be decided only when no alternatives are open, may stay the federal suit in order to enable the parties to litigate the state question in the state courts. *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496; *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 614-615; *Chicago v. Fieldcrest Dairies*, 316 U. S. 168.

Whatever the implications which may be drawn from the *Barney* case as a self-imposed judicial limitation on the jurisdiction of the federal courts in civil cases, its authority upon the existence of

state action *vel non*, for purposes of invoking the penal sanctions of Section 20, can no longer be accepted. As a commentator has said, its suggestion that the defendants were not acting for the State "is unmistakably erroneous. The Board of Rapid Transit Commissioners *was* acting on behalf of the state of New York. There *was* state action. State officials *did* act. Any other conclusion is a metaphysical denial of the actual facts." Isseks, *supra*, at 972.

Our conclusion that Section 20 is to be construed as applicable to deprivations of constitutional right made by subordinate state officials, acting in the name of and for the State, even though not authorized by it, is fortified by the legislative history of the provision. Section 20 was enacted to enforce the Fourteenth Amendment. See Cong. Globe, 41st Cong., 2d sess., pp. 1536, 3480, 3658, 3690, 3807-3808, 3881; Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 219, 223, 227. See also *Hague v. C. I. O.*, 307 U. S. 496, 510; *United States v. Mosley*, 238 U. S. 383, 387, 388. Its precursor was § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27.⁶ Senator Trumbull, chairman of the

⁶ "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of

Senate Judiciary Committee which reported the bill which eventually became the 1866 Act, stated that its purpose was "to protect all persons in the United States in their civil rights, and furnish the means of their vindication." Cong. Globe, 39th Cong., 1st sess., p. 211. He also stated that "The bill applies to white men as well as black men." *Id.*, p. 599.

Section 2 of the Civil Rights Act of 1866 was amended four years later. On February 24, 1870, Senator Stewart introduced a bill (S. 365, 41st Cong., 2d Sess.), § 2 of which became § 17 of the Act of May 31, 1870, 16 Stat. 140. He stated (Cong. Globe, 41st Cong., 2d sess., p. 1536) that the bill "extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States." As finally adopted, the provision read as follows:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by * * * this act, or to different punishment, pains, or penalties on

slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine * * *"

account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Minor changes in phraseology were introduced by the revisers in 1874,⁷ and the draftsmen of the Criminal Code of 1909.⁸ So far as its substance is concerned, however, Section 20 is descended from § 2 of the Civil Rights Act of 1866, as amended by § 17 of the 1870 Act.

R. S. § 5510: "Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

⁷Act of March 4, 1909, 35 Stat. 1092, c. 321, § 20: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

As the Chief Justice observed in the *Classic* case (313 U. S. at 328, n. 10), "While the legislative history indicates that the immediate occasion for the adoption of § 20, like the Fourteenth Amendment itself, was the more adequate protection of the colored race and their civil rights, it shows that neither was restricted to the purpose and that the first clause of § 20 was intended to protect the constitutional rights of all inhabitants of the states." If Section 20 were to be limited to cases in which the actions of the state officers were expressly authorized by state law, the statute would have only the most trivial scope—particularly in view of the requirement that deprivations of constitutional right be "willful." Where an action is based upon an explicit direction of state law, a mistake of law may well negate the element of willfulness. Cf. *United States v. Murdock*, 290 U. S. 389. There is no justification in its legislative history for thus reducing the scope of the statute which, in the clearest and most unequivocal language, was designed to confer broad federal protection upon the enjoyment of basic constitutional rights. See *Catlette v. United States*, 132 F. (2d) 902 (C. C. A. 4); *Culp v. United States*, 131 F. (2d) 93 (C. C. A. 8); *United States v. Trierweiler*, 52 F. Supp. 4 (E. D. Ill.); *United States v. Sutherland*, 37 F. Supp. 344 (N. D. Ga.) Cf. Mr. Justice Holmes in *United States v. Mosley*, 238 U. S. 383, 388.

B. THE PETITIONERS ACTED UNDER COLOR OF LAW

If, as we have attempted to show, the petitioners' conduct constituted state action within the meaning of the statute, there can be no doubt that their acts were done under color of law. The petitioners acted in their capacity as state law-enforcement officers; they did not purport to be acting as private individuals not endowed with the authority of the State. Since they were acting in the performance of their official duties, it is immaterial that they may have exceeded their authority. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U. S. 299, 326, and cases cited.

To sustain the construction we place upon Section 20 would not imply that every transgression of duty by a state official would be prosecuted criminally in the federal courts. Similar fears were expressed—unjustifiedly, as the subsequent history of the statute shows—when § 2 of the Civil Rights Act of 1866 was being debated. Senator Garrett Davis of Kentucky said (Cong. Globe, 39th Cong., 1st sess., p. 598) that "this short bill repeals all the penal laws of the States. * * * The cases of offense and misdemeanor that in these respects the honorable

Senator's bill would bring up every day in the United States would be as numerous as the passing minutes. The result would be to utterly subvert our Government; it would be wholly incompatible with its principles, with its provisions, or with its spirit."

That the dangers envisaged by Senator Davis never were realized is attributable to the explicit provisions of the statute itself, as well as its administration in conformity with the basic objectives sought to be attained by Congress. Four conditions must be met before the penal sanctions of Section 20 can be invoked: (1) there must be deprivation of a right secured by the Constitution or laws of the United States, or subjection of an inhabitant of the United States to different punishments on account of his alienage, color, or race, than are prescribed for the punishment of citizens; (2) where the right consists of being secure against unconstitutional state action, the deprivation must be referable to a State; (3) the action must be taken under color of law; and (4) it must be willful.

Implicit in the administration of the statute has been the assumption that, even though rights secured by the federal Constitution are involved, the primary vindicator of those rights must continue to be the State itself. While Congress was acting to safeguard constitutional rights, there is no evidence that Congress contemplated that the

States would be derelict or impotent in protecting such rights. On the contrary, Congress was complementing existing machinery for the enforcement of constitutional rights. It was providing additional sanctions for the deprivation of constitutional rights, and not substituting federal for state sanctions. This legislative policy is to be found in several provisions of the early civil rights acts. Section 3 of the Act of April 9, 1866, 14 Stat. 27, gave the federal district courts jurisdiction of "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act * * *." And Section 3 of the Act of April 20, 1871, 17 Stat. 13, 14, provided that where the constitutional rights of any group of persons were violated, "and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws * * *."

Effective safeguards assure enforcement of Section 20 in accordance with the policy implicit in its language and history:

(1) Congressional supervision of the policies pursued by the Department of Justice has been careful and thorough. Particularly in recent

years, the staffing and activities of the Civil Rights Section have annually been given close scrutiny.⁹ Any extension of the statute beyond its proper limits could be terminated through withdrawal of the funds necessary to make such increased activity possible.

(2) Prosecutions of all cases under the statute must be brought in the district in which the crime was committed. The judge and the prosecutor are citizens of the state in which the trial is held. The grand jurors, if the prosecution is instituted by indictment, reside within the judicial district, and the petit jurors within the division. The nature of prosecutions under Section 20 is such that the jurors are usually made aware of the implications with regard to alleged federal interference with state law enforcement—an awareness which is often sharpened by the arguments of defense counsel (as in the case at bar, see R. 204-206).

(3) The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to en-

⁹ See, e. g., Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 76th Cong., 1st sess., on the Department of Justice Appropriation Bill for 1940, pp. 58 and 59; 76th Cong., 3d sess., Hearings Department of Justice Appropriation Bill for 1941, pp. 65 and 66; 77th Cong., 2d sess., Hearings, Department of Justice Appropriation Bill for 1943, pp. 63 and 64.

courage state officials to take appropriate action under state law.¹⁰ To assure consistent observance of this policy in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted.¹¹ The number of prosecutions which have been brought under the civil rights statutes is small. No statistics are available with respect to the number of prosecutions prior to 1939, when a special Civil Rights Section was established in the Department of Justice. Only two cases during this period have been reported: *United States v. Baughin*, 10 Fed. 730 (C. C. S. D. Ohio), and *United States v. Stone*, 188 Fed. 836 (D. Md.). Since 1939, the number of complaints received annually by the Civil Rights Section has ranged from 8,000 to 14,000, but in no year have prosecutions under both Sections 20 and 19, its companion statute, exceeded 76. In the fiscal year 1942, for example, 31 full investigations of alleged violations of Section 20 were conducted, and three cases were brought to trial. In the

¹⁰ Testimony of Assistant Attorney General McMahon before the Subcommittee of the Committee on Appropriations of the House of Representatives at Hearings on the Department of Justice Appropriation Bill for 1940, p. 59; Supplements 2 and 3 to Department Circular No. 3356 (Appendix, *infra*, pp. 56-58).

¹¹ Supplements 1, 2 and 3 to Circular No. 3356 (Appendix, *infra*, pp. 56-58).

following fiscal year there were 55 such investigations, and prosecutions were instituted in 12 cases.

Complaints of violations are often submitted to the Department by local law enforcement officials who for one reason or another may feel themselves powerless to take action under state law. It is primarily in this area, namely, where the official position of the wrongdoers has apparently rendered the State unable or unwilling to institute proceedings, that the statute has come into operation. Thus, in the case at bar, the Solicitor General of the Albany Circuit in the State of Georgia, which included Baker County, testified (R. 42): "There has been no complaint filed with me in connection with the death of Bobby Hall against Sheriff Screws, Jones, and Kelley. As to whom I depend for investigation of matters that come into my Court, I am an attorney, I am not a detective and I depend on evidence that is available after I come to Court or get into the case * * *. The sheriffs and other peace officers of the community generally get the evidence and I act as the attorney for the state. I rely on my sheriffs and policemen and peace officers and private citizens also who prosecute each other to investigate the charges that are lodged in Court."

The Government recognizes that this is the first case brought before this Court in which Section 20 has been applied to deprivations of rights

secured by the Fourteenth Amendment. But here, as in *United States v. Classic*, 313 U. S. 299, 324, "It is no extension of the criminal statute * * * to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression." And compare *Browder v. United States*, 312 U. S. 335, 339-340: "Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." To adapt the words of Mr. Justice Holmes in *United States v. Mosby*, 238 U. S. 383, 388: Just as the Fourteenth Amendment was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, Section 20 had a general scope and used general words that have become most important now. Even if we cannot interpret the past by the present, we must not allow the past so far to affect the present as to deprive the people of the United States of the general protection which on its face the statute most reasonably affords.

SECTION 20, AS APPLIED HERE, IS NOT SO VAGUE AND
INDEFINITE AS TO BE UNCONSTITUTIONAL

In his dissenting opinion in the court below (R. 223-227), Judge Sibley expressed the view that Section 20 is unconstitutional because the phrase "rights, privileges and immunities secured and protected by the Constitution and laws of the United States" is unduly vague and indefinite; and that the statute provides "no ascertainable standard of guilt, and the right to be precisely informed of the things to be charged as crimes is not practically preserved" (R. 224, 225). The petitioners have made no such contention either here or in the courts below. But Judge Sibley's challenge to the validity of a statute whose constitutionality has been assumed since its enactment in 1866 merits an answer.

In *United States v. Classic*, 313 U. S. 299, 328-329, it was held that the comprehensive character of the rights protected by Section 20 does not subject the statute to constitutional infirmities: "The generality of the section, made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like." This Court has repeatedly upheld the validity of Section 19 (18 U. S. C. 51) which

punishes conspiracies to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States." See *Ex parte Yarbrough*, 110 U. S. 651; *United States v. Waddell*, 112 U. S. 76; *Logan v. United States*, 144 U. S. 263; *In re Quarles and Butler*, 158 U. S. 532; *Motes v. United States*, 178 U. S. 458; *Gunn v. United States*, 238 U. S. 347; *United States v. Mosley*, 238 U. S. 383; *United States v. Saylor*, 322 U. S. 385. In *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89, upon which Judge Sibley principally relied, a conviction was held unconstitutional where the statute left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against" and where "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

We submit that the comprehensiveness of Section 20 is of a different order. Cf. *United States v. Ragen*, 314 U. S. 513, 523. It was natural that Congress, in seeking to protect all rights secured by the Constitution, should not undertake to catalogue every federally protected right. An attempt to do so would probably have led to more

vagueness and indefiniteness than is inherent in the form of the statute chosen by Congress. This Court long ago recognized that the ideal of complete specificity must yield to the practical requirements of legislation. *Miller v. Strahl*, 239 U. S. 426, 434; *Bandini Company v. Superior Court*, 284 U. S. 8, 18; *Miller v. Oregon*, 273 U. S. 657. The possibility that in circumstances not here presented there may be difficulty in determining whether there has been such a deprivation of constitutional right as to come within the penalties of Section 20 is no reason for doubting the validity of the statute in cases where its applicability is clear. The enforcement of almost every statute involves an inevitable fringe of uncertainty and doubt: " * * * the law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash v. United States*, 229 U. S. 373, 377. "Whenever the law draws a line there will be cases very near each other on opposite sides." *United States v. Wurzbach*, 280 U. S. 396, 399.

CONCLUSION

It is respectfully submitted that the petitioners were properly convicted and that the decision below should be affirmed.

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OCTOBER 1944.

APPENDIX

Extracts from departmental circulars

1. Supplement 1 to Circular No. 3356, issued May 21, 1940:

* * * This memorandum is intended for the assistance of United States Attorneys and their staffs in responding to complaints and in supervising investigations of alleged violations of Federal law in civil liberties matters. Because of the importance of unified and consistent legal theory and prosecution policy in this field, it is requested that no indictments under 18 U. S. C. §§ 51, 52 be presented without clearance from the Department.

2. Supplement 2 to Department Circular No. 3356, issued April 4, 1942:

The existence of war must not be permitted to serve as an excuse for the oppression of any racial, religious, economic, or political group. You are directed to employ every facility available to your offices to secure the cooperation of state and local officials to prevent and rectify situations constituting a threat to the Federally secured civil rights herein discussed. In the interest of consistency and uniformity in the conduct of investigations, the policy of directing all original complaints to the Civil Rights Section of the Criminal Division for clearance and instruction before

embarking on a full investigation will be continued. No investigation or prosecution of these cases should be commenced through the offices of the United States Attorneys without Departmental sanction and because of the importance of maintaining consistent legal theory in these cases, it is requested that proposed indictments be submitted to the Department for consideration before undertaking prosecutive action.

3. Supplement 3 to Circular No. 3356, issued November 3, 1943:

The Department does not desire to institute wholesale prosecutions against overzealous public officials who have deprived others of their religious freedom by the unconstitutional application of leaflet distribution, ordinances or by persisting in the enforcement of compulsory flag salute exercise regulations against school children whose consciences forbid their participation. Prosecutive action should be reserved for those cases where that remains the only means of alleviating the situation. When, therefore, complaints of interferences with religious liberty by state officials are called to your attention, you are requested to contact the appropriate, responsible state officials, pointing out to them the possibility that their actions may involve a denial of constitutional guarantees and seek their cooperation to the end that the activities complained of may be avoided. It is felt that most of the difficulties involving alleged state interference with religious freedom can be avoided through the prompt mediation of the United States Attorneys with the local authorities by letter or personal conference.

You are requested to continue to advise the Department of all complaints coming to you regarding alleged violations of Sections 51 and 52, Title 18, United States Code, and to inform the Department of the results of your efforts to prevent interference with religious freedom in accordance with the procedure suggested above.

